

STATE OF MICHIGAN
COURT OF APPEALS

VILLAGE OF NASHVILLE, TOWNSHIP OF
CASTLETON, and TOWNSHIP OF MAPLE
GROVE,

UNPUBLISHED
August 3, 2001

Plaintiffs-Appellees,

v

MICHIGAN TOWNSHIP PARTICIPATING
PLAN,

No. 224598
Barry Circuit Court
LC No. 98-000665-CK

Defendant-Appellant.

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

In this declaratory judgment action involving an insurer's duty to defend, defendant appeals as of right from an order denying defendant's motion for summary disposition, granting plaintiffs' cross-motion for summary disposition, and awarding plaintiffs their costs in defending against a PCB (polychlorinated biphenyl) contamination lawsuit. We reverse.

I

Plaintiffs jointly operated a transfer station for waste products, which accepted the delivery of four drums of waste oil, subsequently transferred to an oil recycling plant. In 1993, the operator of the recycling plant commenced litigation against plaintiffs in federal court, seeking damages for the contamination of 200,000 gallons of fuel, alleging that the barrels of oil delivered from plaintiffs' transfer station were contaminated with PCB and were the source of contamination of the fuel. Defendant insurer refused to defend plaintiffs in the federal litigation on the basis that the claims would not be covered by plaintiffs' insurance because of a pollution exclusion in the policy and therefore defendant had no duty to defend.

Plaintiffs filed the instant action to recover litigation costs. The parties filed cross-motions for summary disposition. The court granted plaintiffs' motion and denied defendant's motion, awarding plaintiffs stipulated damages of \$276,947, plus prejudgment statutory interest of \$32,504.85 and penalty interest of \$142,886.30.

II

This Court reviews de novo a motion for summary disposition. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Id.* This Court must review the record evidence and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

III

An insurer has a duty to defend its insured if the allegations of the underlying suit arguably fall within the coverage of the policy. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 137; 610 NW2d 272 (2000). In determining whether a duty to defend the insured is imposed, this Court must look behind the third party's allegations to analyze whether coverage is possible. *Id.* at 137-138; *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 357; 559 NW2d 93 (1996). A duty to defend exists if there are any theories of liability that arguably fall within the policy, despite the assertion of other theories that are not covered under the policy. *Radenbaugh, supra* at 137.

Defendant contends that no duty to defend existed because the claims against plaintiffs fall either under the policy's pollution exclusion to general liability coverage or under the pollution claim exclusion to the policy's errors and omissions endorsement. We agree. Plaintiffs' policy includes a pollution exclusion under the comprehensive general liability insurance coverage, which provides:

This policy does not apply to:

- (1) "Personal Injury" or "Property Damage" arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants:
 - (a) at or from premises owned, rented or occupied by the insured;
 - (b) at or from any site or location used by or for the insured or others for the handling, storage, disposal, processing or treatment of waste materials;
 - (c) which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for the insured or any person or organization for whom the insured may be legally responsible; ...

* * *

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and waste materials. Waste material includes materials which are intended to be or have been recycled, reconditioned or reclaimed.

This type of pollution exclusion is known as an absolute pollution exclusion because it eliminates a once-common sudden and accidental exception to pollution exclusions. *McGuirk*,

supra at 353; see, e.g., *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 449, 550 NW2d 475 (1996). Our Court has determined the absolute pollution exclusion to be unambiguous in excluding coverage for claims alleging damage from pollution. *McKusick v Travelers Indemnity Co*, ___ Mich App ___, ___ NW2d ___ (Docket No. 221171, issued 6/8/01), slip op p 4; *McGuirk, supra* at 354.

Plaintiff concedes that some of the claims alleged in the federal litigation are classic environmental claims that clearly fall under the pollution exclusion, but contends that other alleged counts cannot be considered pollution claims: (1) breach of contract for plaintiffs' failure to analyze, test and report the presence of PCBs in the waste oil, (2) fraud in reporting that the oil contained no PCBs and was accurately classified, (3) trespass predicated on the unauthorized shipment of the contaminated oil to the recycling plant, and (4) negligence concerning testing and notification and properly disposing of the contaminated waste oil. Plaintiff contends that these claims do not involve any "actual, alleged or threatened discharge, dispersal, release or escape of pollutants."

In *McKusick, supra* at 5-6, decided after the trial court's decision in this case, this Court held that a pollutant need not cause traditional environmental pollution before triggering a pollution exclusion with regard to the "discharge, dispersal, seepage, migration, release, or escape of pollutants." In *McKusick, id.* at 1-2, 5, the Court concluded that this language implicated the pollution exclusion where a high-pressure hose failed in a manufacturing plant, exposing the plaintiffs employees to a toxic resin carried in the hose and causing them personal injury. The holding in *McKusick* is applicable in this case and mandates a conclusion that a claim premised on the contamination of recycled fuel product from PCBs in waste oil triggers the pollution exclusion as an actual, alleged or threatened discharge, dispersal, release or escape of pollutants.

Looking at the underlying allegations in the federal litigation, we cannot conclude that coverage was possible for the personal injury or property damage arising under any of the theories of liability set forth. In analyzing whether coverage exists, we must focus on the basis for the injury; the allegations must be examined in substance, not merely form. *Allstate Ins Co v Freeman*, 432 Mich 656, 662-663; 443 NW2d 734 (1989); *United States Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 493-494; 506 NW2d 527 (1993).

The alleged damages in the breach of contract, fraud, trespass, and negligence claims all arose from the contamination of recycled fuel product caused by the presence of PCBs. These claims were premised on an allegation that the waste oil delivered to the recycler from plaintiffs' transfer station was mixed with other product, which resulted in the contamination of 200,000 gallons of fuel, shipped to customers by the recycler, but returned because of the PCB contamination. It is undisputed that PCBs are a "pollutant" under the pollution exclusion. Under the terms of plaintiffs' insurance policy, coverage is excluded for damages arising out of the actual or alleged "discharge, dispersal, release or escape of pollutants" "transported, handled, stored, treated, disposed of, or processed as waste by or for the insured." Any damages claim for the alleged PCB contamination would not be covered by plaintiff's policy, and thus, there was no duty to defend against the claims in the federal litigation.

Similarly, we also conclude that coverage for the claims at issue is excluded under the policy's municipal errors or omissions liability exclusion, which excludes coverage for "[c]laims arising out of the insured's failure to regulate, control, or prevent acts or operations which have caused or may be alleged to have caused the discharge, dispersal, release or escape of pollutants." Although plaintiffs' policy covered damages associated with any claim brought against plaintiffs "by reason of any wrongful act, error or omission," no coverage was possible where plaintiffs actions were alleged to have caused the PCB contamination of the recycled oil. Thus, no duty to defend arose concerning the federal litigation.

IV

Plaintiffs further allege that regardless of the construction of the pollution exclusion, defendant had a duty to defend because plaintiffs had reasonable expectations of coverage. We disagree.

Under the reasonable expectations rule, courts consider whether the policyholder, upon reading the contract language, is led to a reasonable expectation of coverage. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 568-569; 596 NW2d 915 (1999). Factors involved in determining whether a policyholder had a reasonable expectation of coverage include:

“whether an insurance policy includes a provision that unambiguously limits or excludes coverage and ... whether a policy holder could have sufficiently examined an insurance policy so as to discover a relevant clause which limits the coverage” [*Id.* (citations omitted).]

There is no ambiguity in the absolute pollution exclusion, and plaintiffs could have discovered the clause upon examination of the contract. Thus, plaintiffs did not justifiably have a reasonable expectation of coverage.

V

In light of our finding that defendant had no duty to defend and therefore plaintiffs were not entitled to judgment in their favor, we need not address the issues of statutory and penalty interest.

Reversed and remanded for entry of an order denying summary disposition for plaintiffs and granting summary disposition for defendant. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Martin M. Doctoroff

/s/ KurtisT. Wilder